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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

425 Eye Street N.W.

BCIS, AAO, 20 Mass, 3/F

Washington, D.C. 20536

File: SRC 02 277 51023

Office: TEXAS SERVICE CENTER

Date:

MAY 19 2003

IN RE: Petitioner:  
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

**PUBLIC COPY**

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

*Robert P. Wiemann*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a public institution for teaching and research. The beneficiary is an academic researcher and clinical critical care anesthesiologist. The petitioner seeks O-1 classification of the beneficiary, under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien with extraordinary ability in science. The petitioner seeks to employ the beneficiary temporarily in the United States for a period of three years as an assistant professor of anesthesiology and a researcher.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary has sustained recognition as being one of a small percentage at the very top of his field.

On appeal, the petitioner submits a brief arguing that the record shows that the beneficiary is an alien with extraordinary ability in his field and submits additional evidence.

The record consists of a petition with supporting documentation, a request for additional documentation and the petitioner's reply, the director's decision, an appeal, brief, and additional documentation.

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability.

The issue raised by the director in this proceeding is whether the petitioner has shown that the beneficiary qualifies for classification as an alien with extraordinary ability in medical science as defined by the statute and the regulations.

8 C.F.R. §214.2(o)(3)(ii) defines, in pertinent part:

*Extraordinary ability in the field of science, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.*

8 C.F.R. §214.2(o)(3)(iii) states, in pertinent part, that:

*Evidentiary criteria for an O-1 alien of extraordinary ability in the fields of science, education, business, or athletics. An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:*

(A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or

(B) At least three of the following forms of documentation:

(1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(2) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(3) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;

(4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;

(5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;

(6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;

(7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;

(8) Evidence that the alien has either commanded a

high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

(C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

8 C.F.R. §214.2(o)(5)(i)(A) requires, in pertinent part:

Consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for O-1 or O-2 classification can be approved.

The beneficiary in this matter is a citizen of both the Slovak Republic and the Czech Republic. According to the beneficiary's curriculum vitae, he received a medical degree in 1994 at the Charles University in Prague, Czech Republic. From 1994 through 1997, the beneficiary conducted an internship in anesthesiology and critical care medicine at the Pisek Hospital in the Czech Republic.

From 1997 through 2001, the beneficiary performed a residency program at the Robert Wood Johnson Medical School, University of Medicine and Dentistry of New Jersey. He was Chief Resident from July 2000 to June 2001. He conducted a specialty residence and a fellowship in critical care medicine from July 2001 until June 2002 with the Department of Anesthesiology and Critical Care Medicine, University of Florida, Gainesville, Florida (the petitioner). The record reflects that he was last admitted to the United States on May 3, 1999, in J-1 classification as an exchange visitor.

The beneficiary is both an academic researcher and clinical critical care anesthesiologist. He has been trained in critical care anesthesia and is credentialed in perioperative transeophageal echocardiography (TEE).<sup>1</sup> The petitioner indicates that fewer than five percent of the licensed anesthesiologists in the United States are subspecialty fellowship trained in critical care anesthesiology. The petitioner also emphasizes that a small number of critical care specialists are trained and credentialed in TEE.

After reviewing the evidence submitted in support of the petition, the director found the beneficiary ineligible for O-1 classification based on finding the sum of the evidence insufficient to demonstrate that he is "at the very top" of his

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<sup>1</sup> Perioperative TEE is a diagnostic procedure used during surgery to monitor the performance of the patient's heart under anesthesia.

field of science pursuant to 8 C.F.R. § 214.2(o)(3)(ii). The director concluded that the record failed to show that the beneficiary was recognized as an alien of extraordinary ability whose achievements have been recognized in the field through extensive documentation.

On appeal, the petitioner asserts that the director erred in weighing the evidence, and submits additional evidence. The petitioner also asserts that the director's decision is contrary to Bureau precedent and policy.

There is no evidence that the beneficiary has received a major, internationally recognized award equivalent to that listed at 8 C.F.R. § 214.2(o)(3)(iii)(A). Neither is the record persuasive in demonstrating that the beneficiary has met at least three of the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B).

*Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor.*

For criterion number one, the petitioner asserts that the beneficiary's receipt of the R.D. Dripps, MD Memorial Award for Most Outstanding Graduating Resident, and the Dean's Prize for Academic Excellence in Medical Studies, qualify as nationally or internationally recognized prizes or awards for excellence. The petitioner also asserts that by virtue of his selection for "an elective attachment to the Royal Liverpool University Hospital in Great Britain," that the beneficiary satisfies this criterion because it was awarded only to outstanding students. Academic study is not a field of endeavor, but training for a future field of endeavor. As such, awards for academic work, scholarships and fellowships cannot be considered awards in a field of endeavor. Moreover, only students compete for such awards. As the petitioner did not compete with nationally or internationally recognized experts in the field, the awards cannot be considered evidence of the beneficiary's national or international acclaim.

*Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.*

For criterion number two, while the beneficiary is a member of the American Society of Anesthesiologists, the American Society of Critical Care and the Florida Society of Anesthesiologists, there is no evidence that these are associations which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines.

*Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date and author of such published material, and any necessary translations.*

For criterion number three, no evidence was submitted.

*Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought.*

For criterion number four, the petitioner asserts, "as an academic anesthesiologist and clinical care medicine specialist, [the beneficiary] is responsible for judging, reviewing, and assessing the work for advancement of medical students, anesthesiology residents and postgraduate fellows (physicians)." In this position, the beneficiary is not judging the work of experienced professionals in the field, but was evaluating the work of medical students, residents and fellows. His service as judge of the work of others in this capacity does not demonstrate sustained acclaim in the field of anesthesiology.

*Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field.*

For criterion number five, while the beneficiary has published results of his research, the record does not show that his research is considered of "major significance" in the field. By definition, all professional research must be original and significant in order to warrant publication in a professional journal. The record does not show that the beneficiary's research is of major significance in relation to other similar work being performed. The petitioner states that the beneficiary has been involved in "important research on cardiac function, optimum anesthesia for cardiac surgery patients, as well as the public health issue of smoking." The petitioner provided the Bureau with a dozen testimonials about the value of the beneficiary's work and skills. Dr. [REDACTED] writes of the beneficiary: "[he] has distinguished himself from other critical care anesthesiologists by incorporating to his expertise the use of Perioperative TEE in highly complex surgeries and intensive care units." One wrote that the beneficiary "pioneered the efforts in our department to expand the use of TEE beyond cardiology to other surgeries and to the intensive care unit of our hospital." Dr. [REDACTED] writes that the beneficiary "is one of the brightest and most promising young academics I have had the opportunity to work with in my 22-year career in medicine." The testimonials' authors all acknowledge the beneficiary's potential and note that he is one of a few qualified in his

subspecialty.<sup>2</sup> Not all critical care anesthesiologists are by virtue of their elite subspecialty considered to enjoy national or international acclaim. Further, talented and accomplished aliens who show great promise have not automatically established their extraordinary ability. In review, the evidence fails to show that beneficiary has sustained national or international acclaim and recognition for major achievements in the field of medicine.

*Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media.*

For criterion number six, the beneficiary has published two articles, participated in peer reviewed funded research and made two presentations at professional conferences. The petitioner asserts that publications in professional journals are not the norm among practicing clinical anesthesiologists and are sufficient to show extraordinary ability. Citing *Matter of X*, LIN 97-173-52618, 1998 WL 34048870, the petitioner argues: "immigration case law, rules and regulations clearly require that writing 'a number of articles in leading journals' should establish that the beneficiary meets this criterion." The petitioner refers on appeal to an unpublished appellate decision in a case involving a neonatologist who had written a number of articles published in leading journals. In that decision it was held that the beneficiary satisfied criterion number six. The petitioner has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the *Matter of X* case. Moreover, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. § 103.3(c). The petitioner failed to provide a citation history of the beneficiary's articles. The petitioner has not demonstrated that the beneficiary's publication of a handful of articles in professional journals has had any impact on the field of anesthesiology. The beneficiary does not satisfy this criterion.

*Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation.*

For criterion number seven, the beneficiary has been employed as a resident, a fellow, and an intern at esteemed medical institutions. While employment with such institutions is evidence of a degree of recognition, such staff or assistant positions are not considered employment in a "critical or essential capacity" as would a department head or lead researcher on major projects. The petitioner also argued that the beneficiary would be employed in a critical capacity for the petitioner by virtue of his responsibilities on a research project. This criterion requires

<sup>2</sup> Only about 5% of the licensed anesthesiologists in the U.S. are trained in critical care anesthesiology. See Dr. [REDACTED] letter.

evidence that the beneficiary has been employed in a critical or essential capacity. The petitioner failed to establish that the beneficiary satisfies this criterion.

*Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.*

For criterion number eight, the petitioner asserts that the proffered wage of \$160,000 is high in the academic field and in the field of anesthesiology. The petitioner states that the prevailing wage for anesthesiologists in Gainesville, Florida ranges between \$63,000 to \$145,000. The national average wage for anesthesiologists in 2001 was \$131,680.<sup>3</sup> The petitioner has established that the proffered wage is high, but failed to provide evidence in the form of a contract or other reliable evidence. The beneficiary does not satisfy this criterion.

The extraordinary ability provisions of this visa classification are intended to be highly restrictive. See 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991). In order to establish eligibility for extraordinary ability, the statute requires evidence of "sustained national or international acclaim" and evidence that the alien's achievements have been recognized in the field of endeavor through "extensive documentation." The petitioner has not established that the beneficiary's abilities have been so recognized.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

<sup>3</sup> U.S. Dept. of Labor Bureau of Labor Statistics at [http://www.bls.gov/oes/2001/oes\\_29He.html](http://www.bls.gov/oes/2001/oes_29He.html) [accessed 5/7/2003.]